

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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DOLLAR PHONE CORP., et al., : 09-CV-3645  
Plaintiffs, :  
v. : January 6, 2010  
DUN & BRADSTREET CORPORATION, : 225 Cadman Plaza East  
et al, : Brooklyn, New York  
Defendants. :  
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE DISCOVERY CONFERENCE  
BEFORE THE HONORABLE STEVEN M. GOLD  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: PERETZ BRONSTEIN, ESQ.

For the Defendant: JASON HALPER, ESQ.

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Proceedings recorded by electronic sound recording,  
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1 (Proceedings being at 10:33 a.m.)

2 THE COURT: So this is the case of Dollar Phone v.  
3 Dun & Bradstreet, 09-CV-3645.

4 Who's here for Dollar Phone?

5 MR. BRONSTEIN: I am, Your Honor. Peretz Bronstein.

6 THE COURT: Mr. Bronstein.

7 MR. BRONSTEIN: Bronstein, Gewirtz & Grossman.

8 THE COURT: Nice to see you. And for Dollar Phone?

9 MR. HALPER: Jason --

10 THE COURT: Excuse me. For Dun & Bradstreet.

11 MR. HALPER: For Dun & Bradstreet, Your Honor, Jason  
12 Halper from the firm Lowenstein & Sandler.

13 THE COURT: Now, you have had an interesting,  
14 although very recently submitted I must say, exchange of  
15 correspondence about Dun & Bradstreet's intention to file a  
16 Rule 12 motion.

17 MR. HALPER: It's been filed.

18 THE COURT: It's already been filed?

19 MR. HALPER: Yes, it was filed in December.

20 THE COURT: And whether or not discovery should  
21 proceed while the motion is pending.

22 MR. HALPER: Correct.

23 THE COURT: I have some questions having read the  
24 letters. Mr. Halper, you assert that if your motion is  
25 successful the case cannot proceed in federal court. Did I

1 understand that correctly?

2 MR. HALPER: Correct. Well, I guess there's two  
3 parts to it. If the claims are dismissed in their entirety  
4 obviously the complaint is dismissed.

5 THE COURT: Right.

6 MR. HALPER: The other point we made was that if  
7 certain claims are dismissed and the case -- and class  
8 certification is not granted on the remaining claims this case  
9 cannot proceed in federal court because the only reason we're  
10 in federal court is based on a class action allegation. This  
11 case was originally filed in state court. We removed under  
12 the Class Action Fairness Act. As pled currently we believe  
13 the \$5 million threshold under that act is met. However, if  
14 we're only talking about -- for instance, if the libel claim  
15 is the only claim that survives we don't think the case can  
16 proceed as a class action and therefore the jurisdictional  
17 allegations would not --

18 THE COURT: Well, which claims are asserted?

19 MR. HALPER: There's three claims in the amended  
20 complaint. There's a claim for -- under Section 349 of the  
21 General Business Law.

22 THE COURT: And that's obviously a state law claim.

23 MR. HALPER: Correct.

24 THE COURT: They're all state law claims.

25 MR. HALPER: They're all state law claims. There's a

1 claim for libel and there's a claim for unjust enrichment.

2 From the defendant's point of view, and I know Mr.  
3 Bronstein probably has a different point of view, but from our  
4 point of view it's really the first claim, the Section 349  
5 claim that is the only reason that this case can even be  
6 thought of as a class action. I've never heard of a class  
7 action based on libel or unjust enrichment but I may be wrong.

8 THE COURT: Do you want to tell me a little bit about  
9 whether or not you think you have a viable class action claim  
10 on these other causes of action?

11 MR. BRONSTEIN: Yes, Your Honor. First of all, you  
12 know there's that old joke about somebody killed his parents  
13 and said he's an orphan.

14 THE COURT: Yes.

15 MR. BRONSTEIN: We've sued in state court. They  
16 removed to federal court. Now he wants to stay discovery  
17 because they don't belong in federal court. So I just would  
18 not be equity of that. I would like the court to take that  
19 into account.

20 THE COURT: It happens all the time in that let's  
21 assume you've brought a Title VII claim and the defendant  
22 thought it was a baseless claim or there was a lack of  
23 jurisdiction or it wasn't timely filed because it's a federal  
24 question claim there's clear federal jurisdiction and they  
25 have a right to ask a federal judge to evaluate its bona

1 fides. Well, because there's diversity and you've asserted a  
2 claim that meets the threshold for diversity or because it's a  
3 class action and is therefore removable, excuse me, they have  
4 a right to have a federal judge adjudicate the viability of  
5 the claim. Right?

6 MR. HALPER: Yes.

7 MR. BRONSTEIN: I understand that they have the right  
8 to move to dismiss. What I'm saying is they want to stay  
9 discovery --

10 THE COURT: Right.

11 MR. BRONSTEIN: -- because the case may end up  
12 proceeding in state court.

13 THE COURT: Right, right.

14 MR. BRONSTEIN: And discovery will take -- it doesn't  
15 matter which court it's in unless they get it dismissed  
16 altogether.

17 THE COURT: Well, if they get a dismissal of the  
18 Section 349 claim on the merits --

19 MR. BRONSTEIN: Yes.

20 THE COURT: -- and there is no legitimate basis for  
21 a class action for your libel and unjust enrichment claims  
22 then the discovery would be limited to the transaction between  
23 the plaintiff and Dun & Bradstreet.

24 Now, I suspect if we push Mr. Halper to the limits  
25 of what he'd be willing to agree to or a ruling he could live

1 with without much protest he'd be willing to proceed to  
2 discovery on the claim of the plaintiff as an individual  
3 against Dun & Bradstreet. The expense of burdensome discovery  
4 is the class action discovery and Mr. Halper makes two points  
5 about that.

6 One, he says I have a very plausible basis for  
7 challenging the Section 349 GBL claim and I don't think that  
8 the plaintiff could withstand Rule 23 scrutiny on the libel  
9 and unjust enrichment claims, and even if the plaintiff could  
10 I have a right to have those matters -- there's no right to  
11 have those questions addressed in federal -- well, maybe there  
12 is. As long as there's a class action allegation with large  
13 damages I suppose the Rule 23 questions on the libel and  
14 unjust enrichment claims could be analyzed, but certainly the  
15 Section 349 claim shouldn't even be the subject of class  
16 discovery and that's the expensive burdensome question.

17 MR. BRONSTEIN: On the merits Your Honor asked me to  
18 respond why I think it would have a class. I just want to  
19 speak about the 349 first. There's no authoritative  
20 authority, authority that's binding on this court that says a  
21 business consumer cannot bring a claim under Section 349.  
22 This product was advertised widely by Dun & Bradstreet on  
23 their small business website with pictures of men and women  
24 working out of their bedroom offices, you know, starting their  
25 own business, how to build your own credit if you're starting

1 your own business. Judge Weinstein of this court who -- I  
2 don't know if a decision of a district judge is binding on  
3 this court but it certainly I'm sure -- it's an elder  
4 statesman of this courthouse --

5 THE COURT: Without a doubt.

6 MR. BRONSTEIN: -- has ruled that --

7 THE COURT: That's in the Verizon v. Yellowbook case.

8 MR. BRONSTEIN: Right.

9 THE COURT: But the Verizon v. Yellowbook case, I  
10 read it. I know the case. It's an approval of a settlement.  
11 There was no dispute about the applicability of Section 349  
12 put before the court.

13 MR. BRONSTEIN: Okay.

14 THE COURT: And I have not found any case where a  
15 business plaintiff successfully invoked Section 349. There  
16 are many cases where businesses who seek to be plaintiffs  
17 under 349 get dismissed.

18 MR. BRONSTEIN: Right.

19 THE COURT: I've written some of them.

20 MR. BRONSTEIN: Well, first of all, Judge, they cite  
21 a Judge Glasser decision, Veroso I think it's called, where he  
22 dismisses a business 349 claim on the grounds that most courts  
23 have dismissed them [inaudible]. They say this is a private  
24 contractual dispute. This is the famous case, the NYU case.  
25 I don't know -- maybe New York Court of Appeals.

1 THE COURT: Which you cite in your letter and which  
2 I've looked at.

3 MR. BRONSTEIN: NYU had a unique negotiated indemnity  
4 agreement.

5 THE COURT: Insurance contract.

6 MR. BRONSTEIN: And it was not a widely product sold  
7 to the -- off the shelf to the public and that's the reason  
8 why Judge Glasser for instance dismissed the business claim.

9 THE COURT: I understand.

10 MR. BRONSTEIN: But Judge Glasser in dicta says the  
11 plaintiffs as a business can bring this case and he kind of --  
12 he passes over that issue accepting it and then he says but  
13 I'm going to dismiss it because it's a private business  
14 dispute. It's not a -- the statute itself, 349, does not say  
15 that one needs to be a business to sue under it and they cite  
16 a case --

17 THE COURT: One needs to be a consumer to sue under  
18 it.

19 MR. BRONSTEIN: One may not be a business consumer.

20 THE COURT: Right.

21 MR. BRONSTEIN: Pardon me for misspeaking.

22 THE COURT: That's okay.

23 MR. BRONSTEIN: They cite a statute, a New York  
24 statute that defines a consumer as -- for household goods but  
25 that's a statute -- I don't recall the -- which particular



1 statute they cited. It has nothing to do with Section 349,  
2 the business corporation law.

3           So the statute itself does not apply this  
4 limitation. There's no Court of Appeals, New York Court of  
5 Appeals case applying this limitation and we agree -- we agree  
6 with the NYU principle that if it were a private business  
7 dispute we could not sue under that statute but this was a  
8 credit building product sold for \$200.00 or \$300.00 over the  
9 internet widely, not negotiated. We actually bought it  
10 through a telemarketer. So we think that we have a 349 claim.

11           The cases I looked at about whether a magistrate or  
12 a judge, magistrate judge or district judge should stay  
13 discovery pending a motion to dismiss, you have to make a  
14 decision -- the court has to decide whether it's likely to be  
15 successful, the motion to dismiss or not. I don't see -- I  
16 don't think that they have a slam dunk by any means on this  
17 349 issue.

18           But even if they do I don't see how we're not going  
19 to be left with two common law claims that are appropriate for  
20 a class action and they are as follows. Unjust enrichment.  
21 There's two products we're complaining about. One is this  
22 credit -- self monitor product. What happened to Dollar Phone  
23 is Dun & Bradstreet monitors you and gives you a credit report  
24 whether you -- 5,000 companies or 10,000 companies and any  
25 company who's monitor has the right to fax in information.

1 You don't have -- if they don't have updated financials on you  
2 they lower your credit score. So they lowered our credit  
3 score. This happened like in '07 and they say okay, fax in or  
4 email your financials. We kept doing it and they said oh, we  
5 don't get it, I don't know. But the self monitor then you'll  
6 be able to control and make sure your financials. So Dollar  
7 Phone bought the self monitor. A year later passes by. Same  
8 thing. End of the year they want the new financials and this  
9 time we got a notice from the self monitor that we don't have  
10 your financials and they said okay and then we worked on the  
11 financials. It happened three years in a row. Three times in  
12 a row they never accepted through fax or email the way they're  
13 supposed to updated financials.

14 What this forced us to -- oh, you have to basically  
15 buy the self monitor or you don't get your financials updated.  
16 I believe this is an unjust enrichment claim.

17 THE COURT: Unless you want to send them certified  
18 mail return receipt requested.

19 MR. BRONSTEIN: Well, we have proof that we emailed  
20 it to them.

21 THE COURT: What's the good faith basis though for  
22 believing that this wasn't a problem between you and Dun &  
23 Bradstreet? What's the good faith basis for believing that  
24 this is a systemic thing that Dun & Bradstreet does  
25 deliberately which is what would be necessary, right, for

1 unjust enrichment?

2 MR. BRONSTEIN: Right.

3 THE COURT: There would have to be some intent. Is  
4 there any evidence that in the business community that the  
5 Better Business Bureau has brought such a complaint against  
6 Dun & Bradstreet or there are news reports of many businesses  
7 reporting this difficulty? Generally before there's a class  
8 action in a products case -- if you buy -- I just had a  
9 picture tube case in the LCD television. I guess it's not a  
10 picture tube. It's the lamp. If your lamp fails you don't  
11 bring a class action on a products liability claim saying  
12 these lamps are defective when there are thousands of lamps  
13 failing around the country. Now you have a good faith basis  
14 to say there's a Rule 23 claim here.

15 You've got a client who had a problem getting its  
16 financial information communicated to Dun & Bradstreet  
17 assuming the allegations of your complaint to be accurate. Is  
18 there any basis to think that this is a systemic problem?

19 MR. BRONSTEIN: Well, first of all, it happened three  
20 years in a row.

21 THE COURT: To you, to Dollar Phones. Excuse me.

22 MR. BRONSTEIN: To Dollar Phone. And that clearly  
23 based on that -- and just by the tenor of the -- when you  
24 speak to the people they say A should have done it and B  
25 should have done it. You just get the runaround at customer

1 service. We have the impression that there was -- we smell  
2 that some shenanigans, that there's no system in place there.  
3 This would be our claim. They do not have a proper practice  
4 and procedure in place to insure that people's financial  
5 information is updated and then they lower your credit score  
6 and it forces people to buy the -- I don't -- so we have  
7 alleged -- that's the basis of our belief that we're entitled  
8 to file a complaint and -- the court is entitled to either --

9 THE COURT: I don't take any disrespect or not from  
10 the way you phrase your argument. Don't hesitate.

11 MR. BRONSTEIN: No. We're entitled to file it based  
12 on that. I think we have sufficient Rule 11 to have made the  
13 allegation and my belief is -- I'm going to get in discovery  
14 and I want to take discovery into exactly how this works. Do  
15 they have people sitting there manning the email and the fax  
16 to update the financials, and that's the basis of our  
17 allegation.

18 Well, let me go on to -- Your Honor understands it.

19 THE COURT: I think I do.

20 MR. BRONSTEIN: So whatever Your Honor thinks about  
21 it that's your choice but at least I've communicated it to  
22 you.

23 THE COURT: You have.

24 MR. BRONSTEIN: Now the breach of contract. There was  
25 another problem we had with them.

1 THE COURT: Which is not pled but would be --

2 MR. BRONSTEIN: It is pled.

3 THE COURT: I'm sorry.

4 MR. BRONSTEIN: The factual problem -- the  
5 allegations are pled. I thought it was in there. I  
6 inadvertently noticed that we don't have the breach of  
7 contract. We have another product they sold us. That's  
8 called the Score Builder and that's again advertised on the  
9 internet and they tell you that this -- when our score went  
10 down because their financials they said you know what, buy  
11 the -- you want to get your score back up buy this Score  
12 Builder. Score Builder they say will take over a six-week  
13 period. You can send us twenty references and if you have  
14 more references it will build up your credit. We pay let's  
15 say \$300.00 for that.

16 Dollar Phone had many credit references who are from  
17 like big carriers, it's a phone company. Dollar Phone buys  
18 minutes from Verizon and they'll say well, Verizon is a  
19 company that we already -- we already have Verizon because  
20 Verizon reports those automatically. So that -- we don't  
21 accept that as a new credit reference. Then we had a bunch of  
22 international carriers that we buy minutes from and pay. We  
23 can't take international carriers because they're not rated by  
24 Dun & Bradstreet. We will only accept a credit reference for  
25 companies rated by Dun & Bradstreet. So what happens is that

1 any large U.S. entity or any reports to Dun & Bradstreet. So  
2 you get no marginal benefit by giving a credit reference from  
3 Verizon. Anyone that's like off the beaten trail like Telecom  
4 Italia they won't accept the reference because they don't rate  
5 Telecom Italia.

6 THE COURT: There are no businesses in America that  
7 you might have credit relationships with that fall into the  
8 category where you could add a reference under --

9 MR. BRONSTEIN: I'm not saying there are zero but  
10 they sold us the product and there's no disclosure on the  
11 website of these limitations.

12 THE COURT: I see.

13 MR. BRONSTEIN: So the product that -- clearly the  
14 universe of acceptable credit references is much narrower than  
15 they advertise and that means the product is less valuable.  
16 So what they're selling for 300 bucks assuming it was -- if  
17 the product would have accepted all credit references for 300  
18 bucks it's something -- worth something less. So we'll put on  
19 an expert and say what they're selling for 300 bucks -- it was  
20 worth 300 bucks with -- if they would take Telecom Italia it's  
21 only worth \$200.00. It's just not as viable a product and  
22 therefore the difference between the value of what they  
23 deliver and what they promised are contractual damages.  
24 Everyone in the country who bought the Score Builder has the  
25 same expectancy damages, contractual damages.

1 I just want to note one -- after I filed this  
2 complaint, although I'm used to it already because plaintiffs'  
3 lawyers are like the lowest breed and it's just a strike suit.  
4 They did change the website and they added the disclaimer.  
5 Now they added the disclaimers. It says on the bottom we'll  
6 only take Dun & Bradstreet rated companies. Therefore,  
7 many --

8 THE COURT: You've already done the public service  
9 you were born to do.

10 MR. BRONSTEIN: Under Rule 23 I'm already entitled to  
11 a fee. So under 23(b)(2).

12 So I don't see how -- why -- just take the Score  
13 Monitor -- Your Honor asked a good question about the self  
14 monitor, meaning what's my basis saying this is systemic.  
15 Let's take that one out. Just the breach of contract on the  
16 Score Builder that they delivered a product, the product was  
17 not as advertised. I don't see how that can get dismissed and  
18 I don't see why it's not appropriate for a class action. You  
19 only need 100 people to satisfy numerosity. I'm not Milberg  
20 Weiss or -- but I think I can represent a class and --

21 THE COURT: It may be a narrower class than the one  
22 you describe but maybe a class of people who have credit  
23 relationships with companies that are excluded by the Dun &  
24 Bradstreet policy that's undisclosed. I don't know that  
25 you're an adequate and appropriate representative for somebody

1 who bought the product and the only credit references they  
2 sought to add were accepted. That person got everything they  
3 paid for; right?

4 MR. BRONSTEIN: That's in terms of -- I don't know if  
5 that's necessarily true because --

6 THE COURT: You buy it for a period of time or do you  
7 pay one [inaudible] perpetuity?

8 MR. BRONSTEIN: You buy it for a period of time but  
9 even on the -- whoever bought this, the potential -- the  
10 potentiality of the product is lesser. It's like saying --  
11 you know what it's like, Your Honor. I paid for a -- my kid  
12 plays the piano. He has a speaker, a 60 watt speaker.

13 THE COURT: Yes.

14 MR. BRONSTEIN: And it's really a 30 watt speaker.  
15 What you're saying is well, your son never turns up his piano  
16 above 10 watts.

17 THE COURT: Right.

18 MR. BRONSTEIN: So who cares. He got all the watts  
19 he needed but it was more expensive -- he played for 60 watts.  
20 They sold a 60 watt product for --

21 THE COURT: My point I guess is different which is  
22 that -- we're close but the question is does he belong in the  
23 same class with someone who went to a performance with his --

24 MR. BRONSTEIN: I hear you.

25 THE COURT: -- supposedly 60 watt amp. It was only



1 30 watts and nobody could hear him and they walked out in the  
2 middle of the performance and he didn't get paid as a result.  
3 He may not be an appropriate representative for the  
4 individuals who only practice in their room and never turn up  
5 the volume.

6 MR. BRONSTEIN: Let's assume for a moment that's  
7 true.

8 THE COURT: It doesn't --

9 MR. BRONSTEIN: We still have a class. We need 100  
10 people.

11 THE COURT: You're right. The problem is is the  
12 class definition, not availability of a class --

13 MR. BRONSTEIN: That's [inaudible] securities class  
14 action which I didn't bring myself but I work with lawyers  
15 that do. So you have like bondholders, stockholders, but all  
16 the time -- and sometimes they do break it up into subclasses.

17 THE COURT: Each with a representative --

18 MR. BRONSTEIN: Not necessarily though. I mean --

19 THE COURT: We're predicting the future. We're  
20 looking down the road and speculating as we do but I  
21 appreciate the zeal and articulation of your argument.

22 MR. BRONSTEIN: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. HALPER: May I respond?

25 THE COURT: Sure.

1 MR. HALPER: First of all --

2 [Pause in proceedings.]

3 MR. HALPER: The discussion we've just been having  
4 regarding a potential breach of contract claim, let's just be  
5 clear for the record there is no breach of contract claim in  
6 the complaint. It's already been amended once. It remains to  
7 be seen whether that will be amended again.

8 THE COURT: It will be.

9 MR. BRONSTEIN: On that particular point, Mr. Halper  
10 makes a good point. First the motion [inaudible] focused on  
11 the absent of class allegations. So I amend them. I add  
12 them. Now his next one is focused on these issues. He's  
13 helping me prove my complaint which I appreciate.

14 MR. HALPER: Anything I can do to help him out.

15 Also, all of the arguments that Mr. Bronstein has  
16 been making I think demonstrate that his complaint here is  
17 really individual harm to Dollar Phone and I think Your Honor  
18 asked him some good questions about well, how does this affect  
19 other customers of Dun & Bradstreet. And that's important  
20 because a) if this is only a harm suffered by Dollar Phone  
21 then the Section 349 claim fails as a matter of law, and also  
22 this goes to the scope of discovery especially while the  
23 motion to dismiss is pending. Mr. Bronstein indicated he  
24 wants to get into policies of Dun & Bradstreet and how these  
25 products are sold and who they're sold to and presumably this

1 will get into if we're talking about other customers whether  
2 their credit scores were lowered and a whole host of other  
3 issues.

4 I think at this stage of the game since there is a  
5 motion to dismiss pending, since we believe that class  
6 certification is definitely going to be challenged and based  
7 on his definition of the class we believe it's going to be  
8 difficult for him to get the class certified. We believe it  
9 would be a waste of time and money to proceed in a wide net of  
10 discovery here. If we're just limiting discovery to Dollar  
11 Phone my comeback to that is the claims between Dollar Phone  
12 and Dun & Bradstreet, his own complaint in paragraph 27 says  
13 that his damages there are \$3,000.00. So if this is a dispute  
14 only between Dun & Bradstreet and Dollar Phone I can guarantee  
15 you there will be no discovery. Dun & Bradstreet is not going  
16 to litigate a case for \$3,000.00 or \$5,000.00.

17 Another point is we filed a motion to dismiss at the  
18 beginning of this case after we had moved. We actually asked  
19 Mr. Bronstein if he planned on amending because we obviously  
20 didn't want to get into wasteful motion practice if there were  
21 just going to be amended complaints. He said at the time that  
22 he was comfortable with the complaint, he was going to stand  
23 on the complaint. We filed a motion. He saw some  
24 deficiencies. He corrected it. He filed an amended complaint  
25 that forced us to file another motion. Now we hear that

1 there's going to be yet another amended complaint. So from my  
2 client's perspective we're spending a lot of money already and  
3 we haven't even completed motion practice and I think we would  
4 like the court to consider that in determining whether for the  
5 next couple of months any type of discovery should proceed let  
6 alone class-wide discovery.

7 THE COURT: You've made your motion. Has opposition  
8 been filed yet?

9 MR. HALPER: No. Opposition, I believe, is currently  
10 due January 20th. Mr. Bronstein told me before the conference  
11 he's going away. He may need an extension. Whatever time he  
12 needs is fine with us but even with an extension I think this  
13 will be -- the briefing will be completed in February with an  
14 extension probably towards the middle or end of the month.

15 THE COURT: Let's assume for argument's sake that a  
16 stay is granted. What can you do to reassure me that if the  
17 stay is lifted a good firm litigation hold is in place not  
18 only with respect to the plaintiff's claims but with respect  
19 to the punitive class claims?

20 MR. HALPER: I can tell you that in-house counsel for  
21 Dun & Bradstreet has sent litigation hold notices to the  
22 persons responsible for gathering this information. So I have  
23 seen that notice so I can represent to the court that the  
24 employees of the company are on notice that this litigation  
25 has been filed. No documents are being destroyed.

1 THE COURT: I'm thinking about electronic documents.

2 MR. HALPER: Yes, electronic documents are being  
3 preserved although to be honest I'm not sure how much  
4 electronic discovery we're talking about. If we're just  
5 talking about emails between Dun & Bradstreet and Dollar Phone  
6 there aren't that many. I've seen them all. There's only a  
7 handful. If we're talking about credit reports for not only  
8 Dollar Phone but other customers, those records are  
9 accessible. I can't represent how far back they go but I know  
10 they're accessible.

11 THE COURT: I'm thinking about different things. I'm  
12 thinking about first of all the advertising or website  
13 information at different points in time for the two products  
14 that are at issue in the lawsuit and I'm thinking about the  
15 purchase information and who the purchaser is and where  
16 they're located for the punitive class members.

17 In other words, let's assume that despite your best  
18 efforts some element of this class, some element of this claim  
19 seeks through the Rule 23 needle and it comes time to notice a  
20 class and it's 18 months from now, will we have lost the  
21 identity of class members who could otherwise be noticed  
22 because of the passage of time?

23 MR. HALPER: I don't think that should be an issue.  
24 The company has transaction records, they have billing  
25 records. Again, I think it would depend on the scope of the

1 claim. If the class is going to be defined as every single  
2 customer who purchased these two products, whether in New York  
3 or elsewhere. I think they can be identified just by looking  
4 at the company's records.

5 THE COURT: Well, all right. I understand what  
6 you're saying. Did you want to add something? I saw you lean  
7 forward. I didn't know if it was to type something or to say  
8 something.

9 MR. BRONSTEIN: No. Well, first of all, Your Honor,  
10 as I anticipated they changed the website and I -- I hope I  
11 didn't [inaudible] try to grab -- I had a picture of what it  
12 looked like when I filed this but I would like to see the  
13 internal communications about changing the website and also if  
14 this case goes forward, which I hope it will, it's going to be  
15 about the internal procedures about how they man the receipt  
16 of the financials. It's about internal systemic  
17 communications. So --

18 THE COURT: Okay.

19 MR. BRONSTEIN: -- it will probably help the case if  
20 I'll be able to show that they destroyed information that they  
21 certainly shouldn't.

22 THE COURT: He wants to amend to add a breach of  
23 contract claim. Do I infer from your remarks that you're  
24 opposed to the amendment?

25 MR. HALPER: Yes. At this point in our brief we

1 actually have a section saying that one amendment is enough.

2 THE COURT: I've seen seventh amended complaints.

3 I've got a solo practitioner here representing an individual  
4 business who is undertaking to represent a class. I'm not  
5 trying to pressure you into anything but what I'm going to do  
6 if you do oppose is say that the time to oppose your motion is  
7 also the time to cross-move for leave to amend. So the breach  
8 of contract claim will be before -- I want that at least  
9 articulated before Judge Glasser so he knows that -- and you  
10 know that if you knock out the other claims but he believes  
11 the contract claim is viable he's going to grant your motion,  
12 he's going to grant his motion and we're going to be back here  
13 on the breach of contract claim.

14 But you're entitled to oppose it and it just gives  
15 him two bites at the apple because he'll be cross-moving for  
16 leave to amend and then he gets the last brief in as he  
17 replies on his cross-motion whereas if you consent to leave to  
18 amend he'll put in his opposition to dismiss and you'll be  
19 able to reply to the opposition on your dismissal motion and  
20 you'll have the last word. So by the practical effect of  
21 declining to consent is to give plaintiff the last word when  
22 you have it but that's fine. I'm sure Mr. Bronstein won't  
23 protest too vehemently.

24 MR. BRONSTEIN: Actually the only other allegation I  
25 intended [inaudible] is on the fact -- it's not in the present

1 complaint. I'm sorry.

2 THE COURT: That's okay. We got you.

3 MR. BRONSTEIN: The fact that the products we bought  
4 were on this -- they have a separate small business whole  
5 company and I think that goes to the 349. So I'm just going  
6 to add the fact that it was a small business and a breach of  
7 contract.

8 THE COURT: I'm going to grant the stay application.  
9 I'm going to grant the stay application because of several  
10 reasons. First of all, my review of the case law leads me to  
11 the conclusion that Dun & Bradstreet's argument, particularly  
12 with respect to the 349 claim, is a strong one. I'm not sure  
13 it will prevail but I believe it's very strong. I recently  
14 had occasion to write about it. I issued a memorandum and  
15 order on March 12, 2009 in Docket Number 01-CV-6242 which is a  
16 publicly filed memorandum and order. It was on a motion for  
17 reconsideration of a sua sponte dismissal of a Section 349  
18 claim and I dealt with the question of whether or not an  
19 individual who was a pilot with an airline and was fired as a  
20 result of a positive drug test result by a laboratory could  
21 bring a Section 349 claim against the laboratory because of  
22 its failure to follow allegedly appropriate procedures.

23 I dismissed the claim and in doing so I wrote as  
24 follows: Plaintiffs contend that Section 349 claims have  
25 survived dismissal motions even when parties bringing them are



1 not individual consumers. However, the facts of the case  
2 primarily relied upon by the plaintiffs which is Oswego  
3 Laborers v. Marine Midland Bank at 85 N.Y.2d 20 are not  
4 analogous to those here. The plaintiffs in Oswego were not  
5 customers but two not for profit associations administering  
6 union benefit funds but the transactions at issue were ones in  
7 which the plaintiffs were acting as and were treated by  
8 defendant as consumers. Thus, in deciding that Section 349  
9 claims could proceed the court held -- you know what. I'm  
10 reading from the wrong section of the opinion, not the one  
11 that I -- let me read you a different section of the opinion  
12 at Page 2. I apologize.

13           As the Consumer Protection Act's name indicates, its  
14 purpose is to protect the consuming public. Generally claims  
15 under the statute are available to an individual consumer who  
16 falls victim to misrepresentations made by a seller of  
17 consumer good through false or misleading advertising. That's  
18 the Small v. Lorillard Tobacco case that I think you probably  
19 both are familiar with, 1999 New York Court of Appeals  
20 decision. Courts considering the scope of the statute have  
21 repeatedly held that a consumer for purposes of Section 349 is  
22 one who purchases goods and services for personal family or  
23 household use. That's Exxon Mobile v. Advanced Information  
24 Engineering Services, Southern District of New York 2004  
25 reported at 328 F.Supp.2d 443.

1           Thus, "New York courts have generally found that  
2 business to business transactions do not give rise to Section  
3 349 claims particularly when the disputed transaction does not  
4 have ramifications for the public at large," and that's the  
5 Exxon Mobile case as well.

6           The meaning of this proposition is twofold said the  
7 Exxon Mobile court. Section 349 liability attaches primarily  
8 where a party's misrepresentations are boilerplate and have  
9 the potential to be repeated. Second, allegedly deceptive  
10 acts that occur between relatively sophisticated entities with  
11 equal bargaining power do not give rise to 349 liability.  
12 Large businesses are not the small time individual consumers  
13 Section 349 was intended to protect. Contracts to provide  
14 commodities that are available only to businesses do not fall  
15 within the parameters of Section 349.

16           So with that kind of case law out there and the  
17 absence of case law showing that businesses, even small ones,  
18 can successfully invoke a consumer protection statute I think  
19 the defendant has the better of the argument.

20           Now, while I agree that it may be that some of these  
21 other claims will survive or that it's likely that it will and  
22 that they may be the subject of Rule 23 discovery thereafter,  
23 the scope of the Rule 23 discovery is going to be very  
24 different particularly because the existence of a state  
25 statutory claim is going to raise questions about whether the

1 class should be limited to New York State or not that might  
2 not arise with common law claims that have elements that are  
3 common around the country, and I don't see any urgency in this  
4 case. This is not a plaintiff who is suffering under an  
5 impairment or who is owed the kind of money that will make a  
6 difference in its ability to survive or thrive or not. The  
7 filing of a punitive class action complaint tolls the statute  
8 of limitations and having taken all of these considerations  
9 into a fact and in the interest of an efficient resolution of  
10 the claim I think the stay is appropriately sought and I'm  
11 granting it.

12           However, I will direct that any motion for leave to  
13 amend be included in the opposition papers which will give the  
14 plaintiff an opportunity for reply. You'll stipulate to a  
15 date for the reply papers unless between now and say a week  
16 from now the defendant consents to the filing of the amended  
17 pleading. And number two, I want something filed by the  
18 defendant within a week confirming what --

19           I took note, Mr. Halper, that you expressed your  
20 thought that a firm litigation hold was in place. I'd like  
21 some confirmation of it in writing and part of the record of  
22 the proceeding. So you can do that by filing a letter and I  
23 would like it to include some reflection of the communication  
24 you've had with Dun & Bradstreet's -- I'm going to call them  
25 IT department. I don't know what they specifically call it

1 because the problem that I've confronted from time to time is  
2 when the software that's used by a company is changed during  
3 the life of a litigation and the data that proceeds the  
4 software change becomes very expensive to retrieve, so I'd  
5 like advance notice of that so we -- if that should occur  
6 while the motion practice is pending or if it survives motion  
7 practice while the class action discovery is pending we can be  
8 sure that it's -- that the information we need is preserved in  
9 a manner that we can access without a lot of expense and a  
10 cost shifting motion from you.

11 MR. HALPER: Very good. Thank you, Your Honor.

12 THE COURT: See you when the motion is decided.

13 MR. BRONSTEIN: Thank you, Your Honor.

14 THE COURT: Take care.

15 \* \* \* \* \*

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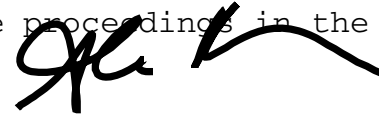
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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.



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6 Shari Riemer

7 Dated: January 11, 2010  
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